Advanced Topics in Visa Petition Proceedings

2018 Executive Office for Immigration Review
Legal Training Program

This training will cover three areas:

- The Adam Walsh Child Protection and Safety Act of 2006,
- Legitimation in Parent-Child Petitions, and
- The Board's recent decisions in *Matter of Ruzku* and *Matter of Rehman*.

ADAM WALSH ACT

Bars a United States citizen or lawful permanent resident petitioner who has been convicted of a "specified offense against a minor" from having a family-based visa petition approved unless the Secretary of Homeland Security determines that the citizen poses "no risk" to the alien beneficiary.

A "**specified offense against a minor**" is an offense that involves any of the following:

A. An offense (unless committed by a parent or guardian) involving kidnapping.

B. An offense (unless committed by a parent or guardian) involving false imprisonment.

C. Solicitation to engage in sexual conduct.

D. Use in a sexual performance.

E. Solicitation to practice prostitution.

F. Video voyeurism as described in section 1801 of title 18, United States Code.

G. Possession, production or distribution of child pornography.

H. Criminal sexual conduct involving a minor or the use of the Internet to facilitate or attempt such conduct.

I. Any conduct that by its nature is a sex offense against a minor.

It is the petitioner's burden to prove that he has not been convicted of a "**specified offense against a minor**."

In determining whether a petitioner's conviction is for a "**specified offense against a minor**," the "**circumstance-specific approach**" is appropriate because it permits inquiry into the facts and circumstances of the offense to ascertain both the age of the victim and the conduct underlying the conviction.

The Board lacks jurisdiction to review the Director's "**no risk**" determination. That determination has been delegated to the "**sole and unreviewable discretion**" of the United States Citizenship and Immigration Services.

The Adam Walsh Act still applies, even when the beneficiary is not a minor or when there are no minors involved in the relationship between the petitioner and the beneficiary.

The Adam Walsh Act does not have an impermissible retroactive effect when applied to convictions that occurred before its enactment.

***Matter of Izaguirre*, 27 I&N Dec. 67 (BIA 2017)**:

Matter of Izaguirre concerned a petitioner who had been convicted of computer-aided solicitation of a minor. But, the "**minor**" with whom the petitioner had been corresponding was actually an undercover police officer.

The Board held that an offense may be a "**specified offense against a minor**" within the meaning of section 111(7) of the Adam Walsh Act, even if it involved an undercover police officer posing as a minor, rather than an actual minor.

The Board noted the use of "**attempt**" in subsection (H) of the "**specified offense against a minor**" definition.

To hold otherwise would run counter to the Adam Walsh Act's stated intent -- "[t]o protect children from sexual exploitation and violent crime, to prevent child abuse and child pornography, to promote Internet safety, and to honor the memory of Adam Walsh and other child crime victims."

The Board also noted that Congress did not use the term "**actual minor**" in drafting section 111(7) of the Adam Walsh Act, even though the term had been used in the another act that was passed 3 years before with the stated purpose of preventing the sexual exploitation of children.

***Matter of Calcano de Millan*, 26 I&N Dec. 904 (BIA 2017):**

What qualifies as a conviction for the Adam Walsh Act?

The Board held that an offense qualified as a conviction where either a formal judgment of guilt has been entered by a court or, if adjudication of guilt has been withheld, where (1) a plea, finding, or admission of facts established the petitioner's guilt and (2) a judge ordered some form of punishment, penalty, or restraint on his or her liberty.

In essence, the Board held that the definition of "**conviction**" found at section 101(a)(48)(A) of the Act – which specifically refers to aliens – could also be used for United States citizen or lawful permanent resident petitioners

Hypothetical

United States citizen petitioner was convicted of solicitation of a minor in 1984, based on interactions with an undercover police officer. The conviction is no longer on his record due to a rehabilitative statute. The visa petition is for his wife, and no kids are involved in this relationship.

The petitioner argues that his crime did not involve a minor, that the crime was from a long time ago, that it's no longer on his record, that he is not a danger to his wife, and that the USCIS Director did not fairly consider the evidence that he would not be a risk to his wife.

This might seem like a complicated case, but it would be resolved easily.

The fact that the crime involved an undercover police officer rather than an actual minor is not dispositive, as the Board held in Izaguirre that such a crime could still be a "**specified offense against a minor**."

The fact that the conviction was from a long time ago is irrelevant, as the Board has held that the Adam Walsh Act does not have an impermissible retroactive effect.

The fact that the conviction was cleared from his record due to a rehabilitative statute does not take him outside of the ambit of the Adam Walsh Act, as *Calcano de Millan* held that it would still be considered a conviction.

The fact that no children are involved in the petitioner is considered part of the "**no risk**" determination over which we have no jurisdiction.

Lastly, the petitioner's arguments concerning the Director's assessment of his evidence would also be considered part of the "**no risk**" determination over which we have no jurisdiction.

LEGITIMATION IN PARENT-CHILD PETITIONS

Included in the definition of child at section 101(b) of the Act is a child legitimated under the law of the child's or father's residence or domicile before the child reaches the age of 18.

This issue will only come up in petitions involving fathers, because cases involving mothers and children only require a biological relationship.

Cases involving fathers, however, require that the child was born in wedlock, was legitimate or legitimated, or had a bona fide parent-child relationship with the father.

If the "**child**" in the petition before you (this could be the petitioner or the beneficiary) was not born in wedlock, your next step should be to explore the legitimation issue.

Matter of Moraga, 23 I&N Dec. 195, 199 (BIA 2001): when a country where a beneficiary was born and resides eliminates all legal distinctions between children born in wedlock and children born out of wedlock, all natural children are deemed to be the legitimate or legitimated offspring of their natural father from the time that country's laws are changed.

The legitimation has to have occurred before the child reaches the age of 18.

Documents in the materials provide information about the legitimation framework in different countries. These include a chart of Board precedents, some documents from USCIS, and a document from the United Kingdom immigration agency.

Use these as a starting point.

Hypothetical

Petitioner Robyn Rihanna Fenty is filing on behalf of her half-sister Samantha Fenty. Robyn and Samantha share a common father only. Both Robyn and Samantha were born in Barbados. Robyn was born in wedlock, but Samantha was born out of wedlock in 1981.

Both Robyn and Samantha must show that they qualify as children of the common father. As Robyn was born in wedlock, she satisfies the definition of "**child**" at section 101(b)(1)(A).

Samantha, however, was not born in wedlock. Moreover, her father did not know of her existence until recently, so there was no bona fide parent-child relationship before Samantha reached the age of 21, as required by section 101(b)(D).

Samantha's last option is to show that, even though she was born out of wedlock, she was legitimate at birth or legitimated before the age of 18.

Matter of Clarke, 18 I&N Dec. 369 (BIA 1983), held that, effective August of 1979, Barbados eliminated all legal distinctions between in-wedlock and out-of-wedlock children. So, since the change in law occurred before Samantha's birth, she is the legitimate daughter of the common father, and the petition from her sister is approvable.

Had Samantha been born in 1960, instead of 1981, she would have been out of luck, because she would have already turned 18 at the time of the change in law.

Matter of Ruzku addresses the use of DNA testing for full siblings.

The Board held that direct sibling-to-sibling DNA test results reflecting a 99.5 percent or higher degree of certainty that a full sibling biological relationship exists should be accepted and considered probative evidence of the relationship.

This left half-siblings in a gray area and also did not reach those situations where the percentage was high but not quite 99.5%.

New USCIS policy memorandum issued in April 2018 (which is included in the course materials) expands on the allowable use of DNA evidence in sibling relationships.

Most importantly, DNA evidence policy now includes half-siblings and lowers the threshold for all sibling DNA evidence situations to 90%.

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Matter of Rehman, 27 I&N Dec. 124 (BIA 2017)

Matter of Rehman involved a birth certificate that was registered in 1958, 2 years after the birth.

The Board held that the Director must consider the birth certificate, as well as all the other evidence of record and the circumstances of the case, to determine whether the petitioner has submitted sufficient reliable evidence to demonstrate the claimed relationship by a preponderance of the evidence.

Although the USCIS almost always deems a registration more than 1 year after the birth as "**delayed**," the Board in Rehman noted that "**[s]uch a bright-line standard has no basis in the regulations or our precedent**."

Even if a birth certificate was not registered contemporaneously with the birth, an adjudicator may conclude that it is sufficiently reliable to establish parentage, depending on the circumstances.

Relevant factors include, but are not limited to

1. information in the Foreign Affairs Manual regarding the availability and reliability of birth registrations in the country of birth during the time period at issue;

--notably, in Rehman, the FAM indicated that birth certificates for those Pakistanis of the beneficiary's generation—namely, those born shortly after the 1947 partition of India—may often be unavailable. The Board instructed that the Director should weigh this fact when considering the persuasiveness of the beneficiary's birth certificate, which was registered in 1958.

2. the length of time between the birth and the registration;

3. any credible explanation proffered by the petitioner as to the personal, societal, or historical circumstances that prevented a particular birth certificate from being registered contemporaneously, and any evidence in support of that explanation;

4. any credible explanation for why a particular birth certificate was lost or destroyed;

5. any evidence that the parental relationship was independently corroborated prior to the registration of the birth;

6. the length of time between the birth registration and the filing of the visa petition;

7. information regarding whether the document was based on facts that were contemporaneous with the birth or on facts that were more recently established.

Hypothetical

Petitioner Yoko Ono is filing on behalf of her full brother, Keisuke. Yoko was born in Japan in 1933, but her birth certificate was not registered until 1935. Keisuke was born in Japan in 1936, but his birth was not registered until 1946. The visa petition was filed in 2016. What potential evidence could help resolve this case?

First, to establish the biological relationship, the parties could have DNA evidence conducted. However, what if Keisuke is currently living in Yemen and cannot get DNA evidence processed?

Looking at the delayed birth certificates, Yoko's was registered 2 years after her birth, but 81 years before the visa petition was filed. This is a factor to consider under Rehman.

Keisuke's delay of 10 years is greater, but what if the Foreign Affairs Manual indicates that, because of World War II, no births were registered in Japan from 1939-1945? That's another factor to consider, as would be how soon Keisuke registered once registration was reinstituted.

QUESTIONS?